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In the Supreme Court of the United States.

October Term, 1900.

Miltenberger Lawder, Percy M. Lawder, and W. Ward Lawder, copartners, trading as S. M. Lawder & Sons, petitioners,
v.
William F. Stone, collector of customs for the district of Baltimore, Md.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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v.
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No. 652.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The petitioners for the writ are engaged in the business of importing pineapples. In the spring or early summer of 1897, they imported a number of cargoes of that fruit. At that time the tariff act of 1894 was in force. Paragraph 213½ of that act read as follows:

> 213½. Dates and pineapples, twenty-five per centum ad valorem.

When the vessels came to discharge, a number of pineapples out of each importation, and out of each invoice, were found to have so decayed as to have largely or altogether lost the shape of pineapples, and to have gone into what the witnesses in the case call

"slush." They had ceased to have any commercial value. In the case in controversy, the number of pineapples which had so decayed was less than 10 per cent of the whole amount of any invoice, and the importer could not abandon to the Government under the provisions of section 23 of the customs administrative act of June 10, 1890. The collector assessed duty on the entire amount of pineapples, the physical constituents of which were actually brought into the port, no matter in what condition they arrived. The importers protested, claiming they ought not to pay duty on such pineapples as had gone into "slush" before the cargo was landed. The Board of General Appraisers reversed the action of the collector and held that the importers were not liable to duty on such decayed and worthless pineapples. They stated, however, that they decided as they did because, and only because, they considered they were controlled by the opinion of District Judge Morris in the case of *Shaw* v. *Dix* (72 Fed. Rep., 166).

The collector appealed from the decision of the board to the United States circuit court for the district of Maryland. After hearing, Judge Morris adhered to his ruling in *Shaw* v. *Dix* (*supra*). From the decree of the circuit court, an appeal was taken by the collector to the circuit court of appeals for the fourth circuit. The last-named court (Goff and Simonton, circuit judges) reversed the decision of Judge Morris, and of the Board of General Appraisers, and held that the importers were not entitled to the allowance claimed by them.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. THE IMPORTERS ARE CLAIMING A DAMAGE ALLOWANCE.

Congress has said that no allowance shall be made for damage. Ever since the passage of the first tariff act claims for allowance or abatement for alleged injury or deterioration in value of imported goods on the voyage of importation have given rise to many difficult questions and controversies between the importers on the one side and the customs officials on the other. Unscrupulous importers contrived, by their skill and success in demanding and obtaining an abatement of duties because of alleged damage to their goods in transit, to secure a dangerous and demoralizing advantage over honest merchants. Secretary of the Treasury after Secretary of the Treasury called the attention of Congress to the evils growing out of the claims for damage allowance. For many years no real remedy for the evil was discovered. Finally, in the customs administrative act of 1890, a simple, just, and effective means of disposing of all such questions in what is practically an automatic way was devised. No longer was there to be any dispute between the Government and the importer. He, for himself and by himself, determined what goods were damaged. The custom-house officials had nothing to do with his determination. The Government had no means of controlling it. The text of the statutory provision then made is as follows:

> SEC. 23. That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon.

> But the importer thereof may, within ten days after entry, abandon to the United States *all or any portion* of the goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned:
>
> *Provided*, That the portion so abandoned shall amount to ten per centum or over of the *whole value* or *quantity of the invoice*.
>
> And the property so abandoned shall be sold by public auction, or otherwise disposed of, for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe.
>
> (Section 23, chapter 407, of the acts of 1890, approved June 10, 1890, Supplement to the Revised Statutes, p. 754.)

All claims for allowance on account of damage were thus expressly abolished, but if an importer for any reason chose to say that some portion of his goods were or had become either absolutely worthless or were of so little value as not to make it worth his while to pay duty upon them, he had the right to abandon that portion of his importation to the Government, provided the portion he offered to abandon amounted to at least 10 per cent in quantity or value of the total invoice.

There can be no question but that the claim of the importers in this case is really a claim for a damage allowance. By the express declaration of the statute no allowance for damage shall be made. To say that the cargo of pineapples suffered more or less serious damage from decay is to describe in apt and accurate

language what happened to it. If this be true, it is respectfully submitted that the importers have no case, for the word "damage" is employed in the statute in the ordinary sense it has in daily conversation, and it has no special or technical meaning given to it. It is used in the broad sense, and is intended to cover all possible claims arising from injurious changes in the condition of the importation from the time it leaves the country of shipment to its final landing at the port of discharge.

A fortiori, the statute covers claims for that character of damage which is to a greater or less extent the natural and almost inevitable incident of the importation.

2. THE IMPORTERS ARE CLAIMING A DOUBLE ALLOWANCE FOR DAMAGE.

The importers are seeking what is practically a double allowance for damage. Every man, when he arranges to import pineapples into this country from the West Indies or the Spanish Main, knows that a greater or less number of them will decay before they reach the United States. In determining the price which he will pay for them at the place of shipment he always takes into consideration their liability to deterioration in transit. The duty is an ad valorem one and the value upon which it is assessed is the actual market value or the wholesale price of the merchandise in question at the time of exportation to the United States in the principal markets of the country from which the same has been imported. (Customs administrative act of 1890, sec. 7.)

The price of pineapples is lower in the markets of the country of export by reason of their inherent tendency to decay on the voyage. When the assessment of duties is made upon the actual value of the pineapples in the country of export, the importer has already an allowance for the average or normal decay of the fruit in transit. To permit him to deduct the decayed pineapples from the number of those upon which he pays duty is in effect to allow him double credit for the injured or decayed fruit. If pineapples will be worth at Baltimore $2 per hundred and it costs 50 cents a hundred to bring them from the Bahamas to Baltimore, and experience has shown that on an ordinary voyage about 5 in every 105 of the pineapples decay so badly as to become worthless, the market value in the Bahamas will be about $1.50 for about every 105 pineapples. The case thus presented can not be distinguished from that of *American Sugar Refining Co.* v. *The United States* (91 Fed. Rep., 646). The importation in that case was of moist or green sugar. It was subject to a duty of 40 per cent ad valorem. It was found that the crude sugars lost from 14 to 16 per cent in weight on the voyage from evaporation and drainage. The appraisers raised the appraisement of sugar from 6s. 8d. cwt., the value at the port of shipment, to 7s. 9d., an increase of about 16 per cent. The validity of this increase of appraisement was upheld by the circuit court of the United States for the southern district of New York.

Undoubtedly accidents may happen sometimes and the importer may lose out of some shipments more

pineapples than the average or normal percentage. In that case, however, he is protected, for whenever the loss amounts to more than 10 per cent in quantity or value of the total invoice he may abandon the damaged portion to the Government.

3. THE LEGISLATIVE CONSTRUCTION SHOWS THAT "DAMAGE" IN THE STATUTE INCLUDES DESTRUCTION OF COMMERCIAL VALUE.

The case for the importer rests upon the assumption that Congress intended by the language it used to include within the terms of the statute only such degree of damage as stopped short of the total destruction of commercial value. There is no warrant in the statute itself for this distinction. The whole scheme of the provision shows that the amount of damage intended must in all cases be at least great enough to render the goods abandoned worth less than the duty upon them: that is to say, they must have ceased to be of commercial value to the importer. If they were of any value to him he would not abandon them. Under the act, the abandonments of utterly worthless property became so numerous that Congress was compelled to require the importers to remove the abandoned goods to such place within the limits of the port of arrival as the chief officers of customs might direct. If the importer refuses or neglects to make such removal, the customs officers are authorized to cause the removal to be made at the cost of the importer. (The act of May 17, 1898, 30 St. L., 417.)

The terms of this act show that Congress considers articles which have ceased to have any commercial

value, and which are mere rubbish, as a part of the importation, and such a part as the importer is entitled to reckon as a portion of the whole 10 per cent necessary to give him the right of abandonment.

4. UNIFORM PRACTICE CONSTRUES "DAMAGE" TO INCLUDE DESTRUCTION OF COMMERCIAL VALUE.

The importers' claim is that the pineapples which have gone into "slush" have not been imported into the United States, and are not therefore subject to duty. If that be true, they can not for any purpose be a part of the importation. The record shows, however, that whenever, by taking the number of specked pineapples and adding them to the number which have gone into "slush," 10 per cent or more of the invoice could be made up, then it is the practice for the importers to tender, and the Government to accept, the abandonment. In all such cases the importers and the custom-house officers agree that the "slush" is a part of the importation. It is only when "slush" and specked pineapples do not amount to 10 per cent that the importers turn around and claim that the "slush" is not any part of the importation at all.

5. THE COURTS CONSTRUE "DAMAGE" IN THE STATUTE TO INCLUDE DESTRUCTION OF COMMERCIAL VALUE.

Two circuit courts of appeal have passed upon the very question raised by the contention of the importers, and both of them have decided in favor of the Government. The first case was *The United States* v. *Bache* (59 Fed. Rep., 762), in which the circuit court of ap-

peals for the second circuit, composed of Judges Wallace, Lacombe, and Shipman, expressly decided that where window glass had been so broken on its voyage over as to cease to exist as window glass, it was still dutiable as window glass. They pointed out that the cases of *Mariott* v. *Brune* (9 How., 619), and those following it, now relied upon by the importers, are not conclusive with respect to the duties to be imposed upon damaged goods where the allowance for damage is specially regulated by statute. To the same effect was the decision of the circuit court of appeals for the fourth circuit in the case at bar. (*Stone* v. *Lawder*, 101 Fed. Rep., 710.)

6. THE INVOICE IS THE UNIT OF IMPORTATION.

The learned district judge, who decided *Shaw* v. *Dix* (72 Fed. Rep., 166), distinguished that case from the case of the *United States* v. *Bache* (*supra*) on the ground that the glass in the Bache case was packed in hampers and each hamper made a separate unit, while the cocoanuts in *Shaw* v. *Dix* were imported in bulk and each cocoanut was a unit of importation.

The statute makes the invoice, and not each separate article included in the invoice, the unit of importation. The importers say that if any pineapple has been so damaged in transit that it has ceased to be a pineapple when it arrives at the port of discharge that pineapple must be deducted from the invoice number of pineapples. They, therefore, claim that each separate pineapple is a distinct unit of importation. The statute for the express purpose, as it is submitted, by negativing all

such claims, declares that the abandonment can only be made of a quantity not less than 10 per cent of the "*whole value or quantity of the invoice.*" The statute thus makes the invoice the unit, and it is obvious that Congress was well advised in so doing. What Congress wanted to do was at once and for all to get rid of all disputes over damage allowances. If the question, whether the importer was or was not entitled to the damage allowance, was to depend in each particular case upon what constituted the unit of importation, and if what was the unit of importation depended upon the way in which the goods were packed for the voyage, controversies would be multiplied rather than diminished. When Congress passed the customs administrative act of 1890, the rule that in importations of fruit the unit was the invoice, and not the individual pineapple, cocoanut, orange, or lemon, was established law. (*Scattergood* v. *Tuttle*, 2 Fed. Rep., 28.) In that case the fruit was imported under a statute which provided that there should be no allowance for decay on the voyage, unless the loss should exceed 25 per cent of the quantity, and the allowance then made shall be only for the amount of loss in excess of 25 per cent of the whole quantity. The court asks where was the warrant for applying the words "quantity" or "whole quantity" to a particular package. If the term "whole quantity" did not refer to the whole quantity imported, why should it be applied to the quantity of a particular package rather than to a particular orange, lemon, etc., damaged? The arrangement into several pack-

ages was merely for convenience of carriage, and the number and size of the packages, which are subject to the will of the importer, should not have, and have not, any effect on the liability to duty. The statute itself distinctly says that for the purpose of a damage allowance the unit of importation is the invoice. If the statute was silent on the subject there could still be no doubt that in cases such as that now under consideration the unit of importation can not be each separate pineapple. The duty is an ad valorem one. If each pineapple is a unit of importation, it would have to be separately assessed, as there can be no question that individual pineapples in each importation differ from each other in value, according to size, quality, etc. Of course, nothing of the sort is, or in the nature of things can be, attempted. What is done is to ascertain the value of such a lot of pineapples as make up the invoice in the principal markets of the country of export at the time of their export. The contention that each individual pineapple forms a unit of importation for the purpose under consideration is contrary to the language of the statute and is inconsistent with the known and necessary conditions of the trade.

CONCLUSION.

Congress intended to put an end to all claims for damage allowance unless such claims took the form of an abandonment of 10 per cent or more of the "total value or quantity of the invoice." This legislation was found within the constitutional powers of Congress.

The legislative intent is manifest. The courts will not reverse the will of Congress, nor by subtile refinements whittle away the beneficent effect of the statute and create a new class of cases for contention and dispute when Congress had determined to make all such disputes impossible. By giving to the statute its simple and natural meaning its purpose will be made effective. The provisions for abandonment will prevent any substantial injustice being done. In the class of cases now before the court the importer suffers no hardship at all, because the decay which takes place is normal and he has protected himself from loss by paying for the goods a lower price than he would have done had they not been liable to such decay.

The circuit courts of appeals for two circuits, in which the question has been raised, have decided adversely to the claims of the importers. Each of these decisions was by a unanimous court.

The petition for the writ of certiorari ought therefore, it is respectfully submitted, be denied.

JOHN K. RICHARDS,
Solicitor-General.

JOHN C. ROSE,
United States Attorney.

APRIL 22, 1901.

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